SURUHANJAYA SEKURITI MALAYSIA v. LIM KOK BOON & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
ADLIN ABDUL MAJID J
[CIVIL SUIT NO: WA-22NCC-389-09-2017]
16 MAY 2024

Abstract – *By their very nature, cases of insider trading involve the possession or exchange of information that is typically confidential and is not generally available to the public. The information is obtained in confidence and is also exchanged in confidence. As such, one can hardly expect the presence of a smoking gun. It is more common for evidence in these cases to be circumstantial and the courts have placed reliance on patterns of circumstantial evidence, derived from the relationship between the parties, their conduct and the timing of transactions entered into. Case laws concerning insider trading have shown that liability for insider trading has been imputed based on inferences established from circumstantial evidence.*

SECURITIES: *Shares – Insider trading – Civil action by Securities Commission Malaysia against individuals for insider trading – Allegation that first individual provided inside information to second individual who then purchased shares related to inside information – Whether individuals in possession of inside information – Whether inside information generally available – Whether individuals knew or ought reasonably to have known that inside information was not generally available – Whether inside information material – Whether transactions involved shares that relate to inside information – Whether shares purchased during relevant transactions fell within definition of 'securities' – Whether elements that proved contraventions sufficiently established – Circumstantial evidence gathered – Capital Markets and Services Act 2007, ss. 188(2)(a) & (3)(a)*

The plaintiff instituted this civil action against the defendants for insider trading under the Capital Markets and Services Act 2007 ('CMSA'). It was the plaintiff's case that the first defendant provided inside information to the second defendant and the second defendant then purchased shares related to the inside information. The shares in issue were of a company known as GW Plastics Holdings Bhd ('GWP'). The principal activity of GWP at the material time was investment holding while its subsidiaries, Great Wall Plastic Industries Bhd ('GWPI') and GW Packaging Sdn Bhd ('GW Packaging') manufactured and marketed plastic film packaging products. GWP had entered into a share sale agreement ('SSA') with Scientex Packaging Film Sdn Bhd ('Scientex Packaging') to dispose of its 100% equity interest in GWPI and GW Packaging to Scientex Packaging for a total cash consideration of RM283,200,000 ('disposal'). This was essentially a disposal

of the entire business and undertaking of GWP to Scientex Packaging. The cash proceeds arising from the disposal were to be distributed to all shareholders of GWP ('distribution'). In effect, GWP would no longer have any business or operations. Prior to the execution of the SSA, GWP announced that: (i) trading in GWP shares had been suspended with effect from 4.43pm on 28 September 2012, pending a material announcement; and (ii) Bursa Malaysia had approved GWP's request to suspend trading of its shares until 5pm on 3 October 2012. On 3 October 2012, an announcement was made to Bursa Malaysia that GWP had entered into the SSA ('announcement'). The person primarily involved in the negotiations on the disposal and the distribution was the first defendant, who was the Chief Executive Officer ('CEO') and substantial shareholder of GWP at the material time. The plaintiff claimed that: (i) the information related to the disposal and the distribution ('inside information') was only made generally available on 3 October 2012 when the announcement was made; (ii) the first defendant had provided the inside information to the second defendant and the second defendant had thereafter acquired 350,000 GWP shares on 25 and 27 September 2012 ('September 2012 transactions'); (iii) the first defendant had breached s. 188(3) of the CMSA, in communicating the inside information to the second defendant while the second defendant had breached s. 188(2)(a) in carrying out the September 2012 transactions. The defendants denied any communications between them on the inside information. They claimed that their relationship was purely professional, thus eliminating the possibility of communications on the inside information. They also raised the following individual defences: (i) the first defendant claimed that it had always been his practice not to disclose market-sensitive and/or inside information to third parties or the second defendant. He further alleged that the plaintiff failed to investigate leaks of the inside information; and (ii) the second defendant contended that the September 2012 transactions were based entirely on her continued interest to invest in GWP shares because of the high returns she received since she first purchased the GWP shares in 2010. The second defendant claimed that, in carrying out the September 2012 transactions, she relied on analyst reports and reports on GWP from newspapers and postings on the Bursa Malaysia website. The elements that must be proved by the plaintiff to establish contraventions under the CMSA, specifically under s. 188(3)(a) by the first defendant and s. 188(2)(a) by the second defendant, were: (i) the defendants must be in possession of the inside information ('first element'); (ii) the inside information must not have been generally available ('second element'); (iii) the defendants should have known or ought reasonably to have known that the inside information was not generally available ('third element'); (iv) the inside information must have been material ('fourth element'); (v) the September 2012 transactions must involve shares that relate to the inside information ('fifth element'); and (vi) the shares purchased during the September 2012 transactions must fall within the definition of 'securities' ('sixth element').

Held (allowing claim):

(1) The fact that the first defendant was in possession of the inside information was not in dispute. As the CEO and substantial shareholder of GW Plastics, the first defendant was the person primarily involved in the negotiations of the proposed disposals with Scientex Packaging. Further, based on the testimony of the first defendant, he was in possession of the inside information from 14 September 2012 and specifically on 25 and 27 September 2012. There was no direct evidence of the second defendant's possession of the inside information. The following circumstantial evidence were considered and it was concluded that they were sufficient to prove, on a balance of probabilities, that the second defendant was in possession of the inside information: (i) the relationship between the defendants; (ii) the events leading to and surrounding the September 2012 transactions; and (iii) the second defendant's dealings in shares in other counters. The first element had been met. (paras 25, 29, 31, 33 & 113)

(2) The defendants' relationship was not purely professional based on the extent of communications between them and the extent of their discussions. The number of SMSes, MMSes and calls exchanged between the defendants did not reflect a purely professional relationship. As an example, between 28 December 2009 and 27 December 2010, the defendants exchanged 1,891 SMSes, ten MMSes and 68 calls while between 28 December 2010 to 27 December 2011, 1,570 SMSes, five MMSes and 28 calls were exchanged. Discussions on insurance or matters related to the first defendant's cars which the defendants claimed they had engaged in, were unlikely to require such extensive exchanges. Further, the discussions between the defendants were not limited only to the services provided by the second defendant to the first defendant and his family. The defendants also discussed GWP's business, trading in GWP shares, travelling and migration and the second defendant's marital issues. It was clear that the defendants had a close personal friendship. However, what was troubling and raised concerns on the defendants' credibilities were their initial failure to disclose this close friendship to the plaintiff. The defendants' lack of transparency in relation to their personal friendship suggested that they had something to hide. (paras 34-36, 40, 45 & 53)

(3) Based on the events leading to and surrounding the September 2012 transactions, the evidence of possession could be inferred from the following: (i) the proximity of time between the defendants' communications and the September 2012 transactions; and (ii) the number of GWP shares purchased, the timing of the purchases and the value of the purchases. The defendants communicated with each other around the dates of the September 2012 transactions. On September

2012, the following occurred: (i) two SMSes were sent by the first defendant to the second defendant, one at 9.03am and another at 11.15am; (ii) approximately 22 minutes after the second SMS, at 11.37am, the second defendant made a telephone call to the office of his remisier ('PW3') and the call lasted for two seconds; (iii) another call was made by the second defendant to PW3, this time to her mobile number. This call was made less than one minute later at 11.38am and lasted for four minutes and eight seconds; (iv) at 11.50am, the second defendant made another call to PW3's mobile number. This call lasted for four minutes 43 seconds; and (v) the second defendant's buy order for 200,000 GWP shares was entered at 11.51am ('first September 2012 transaction'). On 26 September 2012, the following occurred: (i) the second defendant placed a call to the first defendant at 10.19am and this call lasted for three seconds; (ii) this was followed by three SMSes. One was from the second defendant to the first defendant at 10.26am. The last two SMSes were sent by the first defendant to the second defendant. They were issued almost simultaneously at 11.42am and 11.43am, suggesting that the messages were one long message that was sent by way of two SMSes. On 27 September 2012, the following occurred: (i) at 9.42am, the first defendant placed a call to the second defendant using his house telephone and this call lasted eight minutes 27 seconds; (ii) 38 minutes later, at 10.27am, the second defendant made a telephone call to PW3 and this call lasted three minutes 19 seconds; and (iii) the second defendant's buy order for 150,000 GWP shares was entered at 10.37am ('second September 2012 transaction'). From the proximity of the communications between the defendants with the first and second September 2012 transactions, the defendants' explanations that the communications were for the purpose of a medical insurance proposal could not be accepted. (paras 55, 56 & 62-65)

(4) The third circumstantial evidence on the second defendant's possession of the inside information derived from a comparison between the September 2012 transactions and the second defendant's trading patterns in other counters, including Genting Bhd, Supermax Bhd, Sumatec Resources Bhd and Talam Transform Bhd over four years between 2010 and 2014. The comparison produced glaring results. From the second defendant's trades in other counters, it was clear that the second defendant's usual range of investment was between RM8,386.54 to RM35,836.39. This range was similar to her range of investment in GWP shares prior to September 2012, which was between RM2,083.62 to RM39,180.05. However, the second defendant's purchases of GWP's shares during the September 2012 transactions far exceeded this comfortable range. This suggested high confidence in the purchases which further suggested that, on the balance of probabilities, the second defendant was in possession of the inside information when the September 2012 transactions were carried out. (paras 104-106)

(5) It was clear from the evidence that the inside information was made generally available on 3 October 2012 by way of the announcement. There was no evidence to show that the inside information was made generally available prior to the announcement and prior to the September 2012 transactions. The burden was on the first defendant who claimed that the inside information was leaked and was generally available to prove this leak. The first defendant, however, did not provide any evidence to support his claim and as such, failed to discharge this burden. The second element under s. 188 of the CMSA had been met. (paras 119 & 124-126)

(6) There was no evidence of any news articles, press releases, reports or materials including those on the internet on the inside information, until the announcement. As such, a reasonable person would be likely to conclude that the inside information was not generally available until the announcement. The first defendant was the CEO of GWP and was actively involved in negotiations on the disposal. Further, given the first defendant's experience and background in the corporate sector, he would have known that the inside information was market-sensitive and price-sensitive information and would not have been generally made available. The second defendant was also experienced in share trading, having opened a trading account in 2006. As such, she would also have known or ought reasonably to have known that the inside information was not generally available. Further, she confirmed that she did not come across any articles or reports on the disposal. Taking into account the defendants' collective experience in the corporate sector and share trading, the defendants should have known or ought reasonably to have known that the inside information was not generally available until the announcement. The third element had been met. (paras 131 & 133-136)

(7) The court accepted the expert evidence of PW8 on the question of the materiality of the inside information. In the expert report prepared by PW8, the following factors were listed as factors that determined whether a particular information was material: (i) the substance of the information; (ii) the specificity of the information; (iii) the reliability of the information; (iv) whether there was any ambiguity in the information; and (v) whether the information was within the expectation of a reasonable investor. Taking all the factors laid out in the report into account, the inside information was material. Considering the impact of the disposal and the distribution on GWP and the shares of GWP, the inside information, on becoming generally available, would influence reasonable investors in deciding whether or not to acquire or dispose of GWP shares. Further, it was in evidence that after the announcement, there was an increase in the closing price and total value of GWP shares traded. As such, the fourth element had been met. (paras 138 & 145-147)

(8) The fifth element was not disputed. The September 2012 transactions involved the purchase of GWP shares and these shares were the subject of the inside information. (para 148)

(9) The GWP shares that were the subject matter of the September 2012 transactions fell within the definition of 'securities' under s. 2 of the CMSA. Thus, the sixth and final element had been met. (paras 149 & 152)

(10) The plaintiff had sufficiently established the elements that proved contraventions of s. 188(3)(a) of the CMSA by the first defendant and s. 188(2)(a) of the CMSA by the second defendant. It was not necessary for the plaintiff to prove the intention of the first defendant to use the inside information in a manner that would benefit the second defendant. The civil penalties imposed against the first and second defendants were RM1 million and RM500,000, respectively. The first and second defendants were also ordered to pay the plaintiff costs of RM200,000 and RM30,000, respectively. (paras 161, 184-186 & 191)

Case(s) referred to:

Indah Desa Saujana Corporation Sdn Bhd & Ors v. James Foong Cheng Yuen & Anor [2008] 1 CLJ 651 CA ***(refd)***

Juahir Sadikon v. Perbadanan Kemajuan Negeri Johor [1996] 4 CLJ 1 CA ***(refd)***

Lew Chee Fai Kevin v. Monetary Authority Of Singapore [2012] 2 SLR 913 ***(refd)***

Majlis Peguam v. Cecil Wilbert Mohanaraj Abraham [2019] 5 CLJ 139 FC ***(refd)***

Malaysia Building Society Bhd v. Tan Sri General Ungku Nazaruddin Ungku Mohamed [1998] 2 CLJ 340 CA ***(refd)***

Pathmanabhan Nalliannen v. PP & Other Appeals [2017] 4 CLJ 137 FC ***(refd)***

R v. McQuoid [2009] 4 All ER 388 ***(refd)***

Re Vernazza [1960] 1 All ER 183 ***(refd)***

Securities Commission Malaysia v. Toh Kai Fatt [2023] 9 CLJ 130 HC ***(refd)***

See Thong v. Saw Beng Chong [2012] CLJU 817; [2012] 1 LNS 817 CA ***(refd)***

Suruhanjaya Sekuriti Malaysia v. Chan Soon Huat [2017] CLJU 2175; [2017] 1 LNS 2175 HC ***(refd)***

Suruhanjaya Sekuriti Malaysia v. Lim Kok Boon & Anor [2019] CLJU 1269; [2019] 1 LNS 1269 HC ***(refd)***

Suruhanjaya Sekuriti Malaysia v. Sreesanthan Eliathamby [2021] 7 CLJ 913 HC ***(refd)***

Suruhanjaya Sekuriti Malaysia v. Yap Wee Hin [2022] CLJU 1879; [2022] 1 LNS 1879 HC ***(refd)***

Takako Sakao v. Ng Pek Yuen (No 2) [2010] 1 CLJ 419 FC ***(refd)***

Legislation referred to:

Capital Markets and Services Act 2007, ss. 2, 183, 188(1)(b), (2)(a), (3)(a)

Evidence Act 1950, ss. 52, 103

Securities Commission Malaysia Act 1993, s. 134

For the plaintiff - Lim Chee Wee & Kelvin Seah Khye Jie; M/s Lim Chee Wee Partnership & Ng Chian Huey, Annarina Chacko Jacob & Caysseny Boonsiri; Securities Commission Malaysia

For the 1st defendant - Steven Thiru, Gregory Das & Henna Nikita Sanghvi; M/s Steven Thiru & Sudhar Partnership
For the 2nd defendant - Jonathan Gerard & Tan Jit Kai; M/s Ken St James

Reported by Najib Tamby

JUDGMENT

Adlin Abdul Majid J:

Introduction

[1] The plaintiff instituted this civil action, seeking to make the defendants liable for insider trading under the Capital Markets and Services Act 2007 ("CMSA"). The plaintiff claimed the first defendant provided inside information to the second defendant, and the second defendant purchased shares that relate to the inside information.

[2] I found the defendants had contravened the relevant provisions under the CMSA. Thus, I allowed the plaintiff's claim. The reasons for my decision are set out below.

Background Facts

[3] The shares in issue are of a company known as GW Plastics Holdings Berhad ("GWP"). The principal activity of GWP at the material time was investment holding, while its subsidiaries, Great Wall Plastic Industries Berhad ("GWPI") and GW Packaging Sdn Bhd ("GW Packaging"), manufactured and marketed plastic film packaging products.

[4] GWP had entered into a share sale agreement ("SSA") on 3 October 2012 with Scientex Packaging Film Sdn Bhd ("Scientex Packaging"). Pursuant to the SSA, GWP disposed of its 100% equity interest in GWPI and GW Packaging to Scientex Packaging for a total cash consideration of RM283,200,000 ("disposal"). This is essentially a disposal of the entire business and undertaking of GWP to Scientex Packaging.

[5] The cash proceeds arising from the disposal were to be distributed to all shareholders of GWP ("distribution"). In effect, GWP will no longer have any business or operations.

[6] On 28 September 2012, prior to the execution of the SSA, GWP made the following announcements:

(i) that trading in GWP shares had been suspended with effect from 4.43pm on 28 September 2012, pending a material announcement; and

(ii) that Bursa Malaysia had approved GWP's request to suspend trading of its shares until 5pm on 3 October 2012.

[7] On 3 October 2012, an announcement was made to Bursa Malaysia that GWP had entered into the SSA ("announcement").

[8] The person primarily involved in negotiations on the disposal and the distribution was the first defendant, who was the Chief Executive Officer and substantial shareholder of GWP at the material time.

[9] He and the second defendant knew each other. The exact nature of their relationship will be discussed further.

[10] The plaintiff claimed that the information related to the disposal and the distribution ("inside information") was only made generally available on 3 October 2012, when the announcement was made.

[11] It is the plaintiff's case that the first defendant had provided the inside information to the second defendant, and the second defendant had thereafter acquired 350,000 GWP shares on 25 and 27 September 2012 ("September 2012 transactions").

[12] Thus, the plaintiff claimed the first defendant breached s. 188(3)(a) of the CMSA, in communicating the inside information to the second defendant, while the second defendant breached s. 188(2)(a) in carrying out the September 2012 transactions.

[13] The defendants denied any communication between them on the inside information. They claimed their relationship was purely professional, thus eliminating the possibility of communication on the inside information. They also raised the following individual defences:

(i) the first defendant claimed it had always been his practice not to disclose market sensitive and/or inside information to third parties or the second defendant. He further alleged that the plaintiff had failed to investigate leaks of the inside information. He also claimed that this action is an abuse of process; and

(ii) the second defendant contended that the September 2012 transactions were based entirely on her continued interest to invest in GWP shares, because of the high returns she received since she first purchased GWP shares in October 2010. She claimed that in carrying out the September 2012 transactions, she relied on analyst reports and reports on GWP from newspapers and postings on the Bursa Malaysia website.

The Law On Insider Trading

[14] Prohibitions against insider trading are set out in Subdivision 2, Division 1 of Part V of the CMSA. Part V contains provisions on market misconduct and other prohibited conduct. Subdivision 2 relates specifically to insider trading.

[15] The term "insider" is defined in s. 188(1) of the CMSA. The section provides that a person is an "insider", if that person:

(a) possesses information that is not generally available which on becoming generally available a reasonable person would expect it to have a material effect on the price or the value of securities; and

(b) knows or ought reasonably to know that the information is not generally available.

[16] Section 188(2) contains conducts an insider is prohibited from carrying out, including acquiring or disposing of securities related to the information in his possession.

[17] Section 188(3) imposes a further prohibition involving securities traded on a stock market. This is a prohibition against tipping, which is the communication of inside information to a third party who would or would tend to act on such information. Section 188(3) states:

(3) Where trading in the securities to which the information in subsection (1) relates is permitted on a stock market of a stock exchange, the insider shall not, directly or indirectly, communicate the information referred to in subsection (1), or cause such information to be communicated, to another person, if the insider knows, or ought reasonably to know, that the other person would or would tend to –

(a) acquire, dispose of, or enter into an agreement with a view to the acquisition or disposal of, any securities to which the information in subsection (1) relates; or

(b) procure a third person to acquire, dispose of or enter into an agreement with a view to the acquisition or disposal of, any securities to which the information in subsection (1) relates.

[18] The elements required to prove a case of insider trading are set out in *Suruhanjaya Sekuriti Malaysia v. Sreesanthan Eliathamby* [2021] 7 CLJ 913, where Azizul Azmi Adnan J (as His Lordship then was) held as follows:

[70] The trading prohibition may be distilled into the following constituent elements:

(i) the Commission must prove that the defendant was in possession of information;

(ii) the Commission must establish that the information in question was not generally available;

(iii) the Commission must prove that the defendant knew or ought reasonably to have known that the information was not generally available.

(iv) it must also be shown that if the information were generally available, a reasonable person would expect it to have a material effect on the price or value of securities;

(v) the defendant traded in the securities to which the information relates while in possession of the information; and

(vi) the securities in question came within the definition of "securities" applicable at the material time.

[19] In reaching a determination of this matter, I examined and considered each of these elements.

[20] In my view, these elements do not only apply to cases involving a contravention of s. 188(2) of the CMSA. They would also apply to a contravention of s. 188(3). In the case of s. 188(3), the plaintiff must additionally prove that the person communicating the inside information (the tipper) knows or ought reasonably to know that the person receiving the information (the tippee) would or would tend to acquire or dispose of securities to which the information relates, or to enter into an agreement with a view to acquire or dispose of such securities, or to procure a third party to do the same.

[21] This additional factor will be addressed when the first element to prove insider trading – that the defendants were in possession of the inside information – is considered.

Element 1: The Defendants Must Be In Possession Of The Inside Information

What Constitutes Inside Information?

[22] The term "information" is defined in s. 183 of the CMSA to include:

(a) matters of supposition and other matters that are insufficiently definite to warrant being made known to the public;

(b) matters relating to the intentions, or likely intentions, of a person;

(c) matters relating to negotiations or proposals with respect to –

(i) commercial dealings; or

(ii) dealing in securities;

(d) information relating to the financial performance of a corporation;

(e) *information that a person proposes to enter into, or has previously entered into one or more transactions or agreements in relation to securities or has prepared or proposes to issue a statement relating to such securities;* and

(f) matters relating to the future. (emphasis added)

[23] In para. 19 of the amended statement of claim, the plaintiff defined the inside information as:

… the information relating to the Proposed Disposal and the Proposed Distribution …

[24] Since information relating to the disposal and the distribution is information related to GWP's proposal to enter into transactions or agreements in relation to its securities, the inside information falls within the scope of sub-s. (e) of s. 183 of the CMSA.

Was The First Defendant In Possession Of The Inside Information?

[25] The fact that the first defendant was in possession of the inside information is not in dispute. In para. 12 of the statement of agreed facts between the plaintiff and the first defendant, it is stated that:

> As the Chief Executive Officer and substantial shareholder of GW Plastics, D1 was the person primarily involved in the negotiation of the Proposed Disposals with Scientex Packaging.

[26] Further, in answer to question 21 of the first defendant's supplementary witness statement ("WS-DW3(B)"), he confirmed that:

> … I was in possession of the material information in respect of my decision to sell my GW Plastics shares, during this entire period of 14.9.2012 to 24.9.2012 …

[27] The first defendant was cross-examined on the statement he made, and he clarified that the material information referred to in para. 21 of WS-DW3(B) is his decision to separate.

[28] With regard to the specific dates when the September 2012 transactions occurred, namely 25 and 27 September 2012, the first defendant provided the following explanations during cross-examination:

> LCW Then, you agree that you were in possession of information regarding the corporate exercise before 03/10/2012?
>
> LKB That's correct.
>
> LCW Yes. And in fact, you were in possession of this information about the corporate exercise on 25th and 27th September. Correct?
>
> LKB Yes, that's correct. (emphasis added)

[29] Thus, based on the testimony of the first defendant, he was in possession of the inside information from 14 September 2012 and specifically on 25 and 27 September 2012.

Was The Second Defendant In Possession Of The Inside Information?

[30] The next question, whether the second defendant was in possession of the inside information when she carried out the September 2012 transactions, is highly contentious.

A Reliance On Circumstantial Evidence

[31] There is no direct evidence of the second defendant's possession of the inside information. The defendants argued that a mere fact of communication, without proof of the content of the communication is insufficient for the purpose of liability under ss. 188(2)(a) and 188(3)(a) of the CMSA.

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[32] I am unable to agree. By their very nature, cases of insider trading involve the possession or exchange of information that is typically confidential, and is not generally available to the public. The information is obtained in confidence, and is also exchanged in confidence. As such, one can hardly expect the presence of a smoking gun. It is more common for evidence in these cases to be circumstantial, and the courts have placed reliance on patterns of circumstantial evidence, derived from the relationship between the parties, their conduct, and the timing of transactions entered into. Liability for insider trading has been imputed based on inferences established from circumstantial evidence (see *Suruhanjaya Sekuriti Malaysia v. Chan Soon Huat* [2017] CLJU 2175; [2017] 1 LNS 2175; [2018] 9 MLJ 782; *Suruhanjaya Sekuriti Malaysia v. Yap Wee Hin* [2022] CLJU 1879; [2022] 1 LNS 1879; [2022] MLJU 1915; and *Securities Commission Malaysia v. Toh Kai Fatt* [2023] 9 CLJ 130; [2023] 10 MLJ 670).

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[33] In this case, I considered the following circumstantial evidence and concluded that they are sufficient to prove on a balance of probabilities, that the second defendant was in possession of the inside information:

(i) the relationship between the defendants;

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(ii) the events leading to and surrounding the September 2012 transactions; and

(iii) the second defendant's dealings in shares in other counters.

The Relationship Between The Defendants

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[34] On the first circumstantial evidence, the relationship between the defendants, I found that the defendants' relationship was not purely professional. In reaching this conclusion, I considered two factors, namely the extent of communications between the defendants and the extent of their discussions.

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[35] To demonstrate the extent of communications between the defendants, the plaintiff prepared a table containing an overview of the number of short message services ("SMS"), multimedia messaging services ("MMS") and telephone calls sent and made between the defendants within identified billing periods. The table is reproduced below:

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Billing Period	Sender/Recipient	SMS	MMS	Calls
28.12.2009 - 27.12.2010	LKB to CMH	1136	5	24
	CMH to LKB	755	5	44
	Total	**1891**	**10**	**68**
28.12.2010 - 27.12.2011	LKB to CMH	934	2	12
	CMH to LKB	636	3	16
	Total	**1570**	**5**	**28**
28.12.2011 - 27.12.2012	LKB to CMH	133	3	4
	CMH to LKB	129	2	5
	Total	**262**	**5**	**9**

[36] I am of the view that the number of SMS, MMS and calls exchanged between the defendants do not reflect a purely professional relationship. As an example, between 28 December 2009 and 27 December 2010, the defendants exchanged 1,891 SMS, ten MMS and 68 calls, while between 28 December 2010 to 27 December 2011, 1,570 SMS, five MMS and 28 calls were exchanged. Discussions on insurance or matters related to the first defendant's cars, which the defendants claimed they had engaged in, are unlikely to require such extensive exchanges.

[37] I then examined the reasons provided by the defendants for these exchanges. The defendants claimed that between 28 December 2009 to 27 December 2010, they were discussing insurance policies proposed by the second defendant and purchased by the first defendant. However, such extensive discussions on this issue would have been improbable, as the first defendant had only purchased insurance policies from the second defendant between October to December 2010. Further, it is a fact that no pay-out was made on these policies. The first defendant also confirmed that payments for these policies were handled by his wife, as were discussions with the second defendant on other additional policies.

[38] The defendants also claimed they discussed matters related to the first defendant's cars in the period between 28 December 2009 to 27 December 2012. However, it is in evidence that there were only three transactions related to cars during this period. The first two transactions involving a Honda-CRV were handled by the first defendant's wife, while Lim Chun Yuan who was the Finance Manager of GWP handled the third transaction involving the purchase of a Mercedes-Benz. Yet, this same period between 28 December 2009 to 27 December 2012 saw the exchange of 3,723 SMS, 20 MMS and 105 calls between the defendants. My inference from the facts before the court is that these exchanges are unlikely related to the first defendant's cars, or the purchase of insurance policies.

[39] I accept that the extent of the communications in itself cannot be a gauge of the closeness of a relationship between individuals. As such, I considered the second factor, which is the extent of discussions between the defendants.

[40] It is in evidence that the discussions between the defendants were not limited only to the services provided by the second defendant to the first defendant and his family. The defendants also discussed GWP's business, trading in GWP shares, travelling and migration, and the second defendant's marital issues.

[41] The extent of the communications between the defendants on trading in GWP shares is clear in the third statement given by the first defendant under s. 134 of the Securities Commission Malaysia Act 1993 ("s. 134 statement") on 10 June 2016:

> Q: How were you made aware of the fact that Elaine Cheah Mean Har invests in shares?
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> A: I think this was subsequent to the second statement I had at the SC, she came looking for me. She told me that she got a bit concerned about something, she told me she bought shares, I asked her how much she bought, and she showed me the statement. *Even in the past, way before all of this, she told me that she wanted to invest in shares, she would ask me if Great Wall shares are good or not. Then I told her that the dividend yield is high.* I remember that during GW Plastics' listing, it was around the same time when I was buying insurance from her. I think I was busy, so I did inform her that I was busy due to the listing, so she knew about it. I mean I am the promoter of GW Plastics, because it gives very good dividend yield. *I know that she was very interested in GW Plastics shares for a long time, she doesn't understand shares so much, so I told her that if you are not into shares, I told her that just buy a stable share, with a great dividend yield.* But I only found out that she bought in shares subsequently when she told me. She told me that she was asked in to come in to the SC for an interview. So she is not sure about the offence as per the notice, typically I told her buying GW Plastics shares is not an offence, unless she bought it based on inside information. That's about it, I didn't think much about that really. *Because she had ask me in the past whether GW Plastics shares were good or not,* so I was not shocked, because many of my friends bought GW Plastics shares for the good dividend yield. Elaine Cheah informed me because she was concern, not that we are close, she was called in because of her trades in GW Plastics, so GW Plastics is me, so that's why she informed me.
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> (emphasis added)

[42] During cross-examination, the first defendant admitted that he provided investment advice to the second defendant. He also confirmed his statement in his third s. 134 statement, that the second defendant had

informed him she wanted to invest in shares, and she had asked him if GWP shares were a good investment. He had informed her that the dividend yield for GWP shares is high, and explained how dividend yields are calculated.

[43] Both defendants also admitted that they spoke on issues such as travelling and migration. The second defendant explained that she reached out to the first defendant on migration issues as the first defendant had mentioned to her that he was thinking of migrating to the United States.

[44] The second defendant also admitted that she discussed her marital problems with the first defendant, and had reached out to the first defendant after finding out that her husband had an affair.

[45] From the admissions by both defendants on the communications that they had with each other and the issues they discussed, it is clear to this court that they had a close personal friendship. However, what is troubling and raised concerns on the defendants' credibility is their initial failure to disclose this close friendship to the plaintiff.

[46] The following questions were asked of the second defendant when her first s. 134 statement was taken on 2 April 2014:

> Q: Do you know anyone at GWP *eg*, directors, employees, management *etc*?
>
> A: When I was attached to Cycle & Carriage previously, I sold a Mercedes-benz to the company and I dealt with the Secretary all the time.

[47] In her second s. 134 statement given on 9 April 2015, the second defendant was asked to confirm her knowledge of a few individuals, including the first defendant. She explained that she had sold insurance to the first defendant's family. She was then asked why she did not mention her dealings with the first defendant earlier. She responded as follows:

> Because **initially I could not remember,** and I was not sure what to tell you. (emphasis added)

[48] In the same s. 134 statement, the second defendant was asked about her discussions with the first defendant:

> Q: When you were in contact with Lim Kok Boon, what do you normally discuss about?
>
> A: *We only talk about matters relating to the insurance.* We have only met in person a few times at a café. *We do not talk about anything else. I think when I was discussing about the insurance proposals with Lim Kok Boon, I think I already started trading in GW Plastics shares. But I never discuss about his company with him.* Only about the insurance … (emphasis added)

[49] However, in the second defendant's third s. 134 statement given more than a year later on 7 June 2016, the second defendant explained that she had in fact discussed other matters with the first defendant:

> … I want to clarify, actually it's not like I only talk about insurance, it's just that we don't talk about shares, we talk about other things like migration to other countries, travelling, it's not like we only talk about the insurance policy only.

[50] Given the close nature of the second defendant's friendship with the first defendant as shown by both defendants' subsequent admissions on the issues they discussed, it is in my view improbable that the second defendant did not remember knowing anyone from GWP, at the time she provided her first s. 134 statement. It is also improbable for her not to have recalled issues they discussed outside the topic of insurance proposals, when she gave her second s. 134 statement.

[51] The first defendant was equally not forthcoming when he provided information on the nature of his relationship with the second defendant. In the second s. 134 statement provided by the first defendant on 24 October 2014, the first defendant informed the plaintiff that he contacted the second defendant when he had issues with his car. He neglected to reveal his personal relationship with the second defendant. The first defendant also maintained, in his amended defence, that his relationship with the second defendant was exclusively professional.

[52] The first defendant only revealed his personal relationship with the second defendant in his re-amended witness statement ("WS-DW3(A)"), which was filed mid-way through trial, on 13 June 2022. In WS-DW-3(A), in his answer to question 19, he admitted discussing matters concerning his son and family travels with the second defendant.

[53] In my view, the defendants' lack of transparency in relation to their personal friendship suggests that they had something to hide.

[54] Thus, having considered the extent of the defendants' communications as well as the scope of issues they discussed, I found that the defendants had a personal friendship beyond that of professional relationship.

The Events Leading To And Surrounding The September 2012 Transactions

[55] I will now move on to the second circumstantial evidence on the second defendant's possession of the inside information. I looked at events leading to and surrounding the September 2012 transactions and found that the evidence of possession can be inferred from the following:

(i) the proximity of time between the defendants' communications and the September 2012 transactions; and

(ii) the circumstances surrounding the September 2012 transactions. In this regard, I considered the number of GWP shares purchased, the timing of the purchases and the value of the purchases.

[56] On the proximity of time between the defendants' communications and the September 2012 transactions, I will start by pointing out a fact that is beyond dispute, which is that the defendants communicated with each other around the dates of the September 2012 transactions.

[57] The defendants claimed that the communications were in relation to a request for a proposal for medical insurance. However, the SMS are no longer in the defendants' possession and as such, there is no evidence of the content of their communications.

[58] The first defendant sought to explain that the reason why the SMS are no longer in his possession is because the internal storage capacity of his phone had exceeded, and he was forced to delete his messages. He provided no evidence to support his explanation, save for a sample screenshot of a notification on the status of a phone's internal storage capacity. There is no proof that the notification belongs to his phone. The second defendant also explained that the SMS are no longer in her possession as she had lost her phone. She did not provide any evidence to support her explanation.

[59] Since there is no evidence to support the defendants' explanations as to why they did not have the SMS exchanged around the time of the September 2012 transactions, I am unable to accept their explanations.

[60] Ultimately, there is a complete absence of any information related to the insurance proposal. I find this disconcerting. No emails were sent, and no copies of the proposal were exchanged, raising doubts in my mind as to the defendants' claim on the content of the communications.

[61] With no evidence of the content of the communications between the defendants, I considered the events that happened between 25 to 27 September 2012.

[62] On 25 September 2012, the following occurred:

(i) two SMS were sent by the first defendant to the second defendant, one at 9:03:08am and another at 11:15:22am;

(ii) approximately 22 minutes after the second SMS, at 11:37:43am, the second defendant made a telephone call to the office of her remisier, Choo Choon Hong ("PW3"). The call lasted for two seconds;

(iii) another call was made by the second defendant to PW3, this time to her mobile number. This call was made less than one minute later at 11:38:09 am, and lasted for four minutes and eight seconds;

(iv) at 11:50:14am, the second defendant made another call to PW3's mobile number. This call lasted for four minutes 43 seconds; and

(v) the second defendant's buy order for 200,000 GWP shares was entered at 11:51:36am ("first September 2012 transaction").

[63] On 26 September 2012, the following occurred:

(i) the second defendant placed a call to the first defendant at 10:19:52am. This call lasted for three seconds; and

(ii) this was followed by three SMS. One was from the second defendant to the first defendant, at 10:26:51am. The last two SMS were sent by the first defendant to the second defendant. They were issued almost simultaneously at 11:42:27am and 11:43:31am, suggesting that the messages were one long message that was sent by way of two SMS.

[64] On 27 September 2012, the following occurred:

(i) at 09:42:10am, the first defendant placed a call to the second defendant using his house telephone. This call lasted eight minutes 27 seconds;

(ii) thirty-eight minutes later, at 10:28:47am, the second defendant made a telephone call to PW3. This call lasted three minutes 19 seconds; and

(iii) the second defendant's buy order for 150,000 GWP shares was entered at 10:37:16am ("second September 2012 transaction").

[65] From the proximity of the communications between the defendants with the first September 2012 transaction and the second September 2012 transaction, I am unable to accept the defendants' explanations that the communications were for the purpose of a medical insurance proposal.

[66] In *Toh Kai Fatt* (*supra*), the defendant purchased the shares in question two days after his initial communication with the plaintiff's second witness. Ong Chee Kwan JC (as His Lordship then was) held that the timing of the communication and the timing of the defendant's trade in the shares cannot be put down to mere coincidences.

[67] Similarly in this case, the proximity of the communications with the September 2012 transactions is not likely to have been a coincidence.

[68] The second defendant attempted to explain the connection between her communications with the first defendant and her purchase of GWP shares. She explained that when she received the SMS from the first defendant on the morning of 25 September 2012, she was triggered to think of GWP shares, which caused her to call her remisier, PW3. This explanation is contained in the affidavit in reply (three) affirmed on 7 February 2019, in respect of the second defendant's application to strike out the plaintiff's claim. The second defendant stated that:

4.17. On 25.9.2012. I received an SMS from D1, requesting for a proposal for medical insurance. **I was piqued to receive such an SMS from D1.** Usually, an insurance agent, such as me, would seek out a potential client with insurance proposals. But here, it was D1 who contacted me to ask me lo give him a proposal for medical insurance.

4.18. **This triggered me to think about the shares in GW Plastics, which was D1's company.** It caused me to call up my remisier, Ms. Choo, to enquire about the status of the market in relation to the trading of the shares in GW Plastics. My remisier told me that the market was active for shares in GW Plastics and that I could buy more shares. (emphasis added)

[69] I am of the view that if this explanation was indeed true, the second defendant would not have attempted to contact PW3 in the manner that she did. She had called PW3 twice, the first time using PW3's office number. When the second defendant did not manage to reach PW3 at her office, the second defendant called PW3 on her mobile number, less than one minute later. The conduct of the second defendant suggests some level of urgency on her part to purchase GWP shares. This led me to conclude that it is improbable that the reason for the September 2012 transactions was because she was triggered to think about GWP shares. It was more probable that the second defendant was in possession of the inside information.

[70] What I found curious about her explanation is that despite being "piqued" to receive an SMS from the first defendant on a proposal for medical insurance, there is no evidence of her responding to the first defendant on the proposal, on 25 September 2012. She explained that it is not usual for a potential client to contact an agent for an insurance proposal. Yet, instead of acting on the lucky break that is the SMS from the first defendant – which would be the most reasonable immediate course of action – the first person she contacted was her remisier, PW3. These events have led me to the irresistible conclusion that on the balance of probabilities, the SMS received by the second defendant from the first defendant was not a request for a medical insurance proposal, but instead contained the inside information.

[71] I considered the first defendant's contention that information on the disposal could not possibly have fit into the two SMS sent by the first defendant to the second defendant on 25 September 2012.

[72] I accept the first defendant's argument that information on the disposal would comprise details on the purchase of GWP shares, the entities involved, the number of shares purchased and the purchase price. In this regard, I do not disagree that such detailed information is not likely to fit into the two SMS sent on 25 September 2012.

[73] However, it is my considered view that the first defendant's contention arose from his misconception that the inside information is information on the disposal and the distribution. This is incorrect. In para. 19 of the amended statement of claim, the plaintiff defined the inside information as:

> … the information **relating to** the Proposed Disposal and the Proposed Distribution … (emphasis added)

[74] The scope of information that relates to the disposal is much wider than information on the disposal. While information on the disposal would contain details of the disposal, information relating to the disposal can contain details of the disposal in a reduced form. Thus, for the plaintiff to prove contravention of s. 188(3)(a) of the CMSA, the exact information on the disposal does not need to be communicated. Instead, it is sufficient for the inside information to contain information relating to the disposal, such as the fact that GWP is selling its entire shareholding. This level of detail would have likely been able to fit into the two SMS sent by the first defendant to the second defendant on 25 September 2012.

[75] At this point, and having established that the first defendant communicated the inside information to the second defendant on 25 September 2012, I will address the question of whether the first defendant knew, or ought reasonably to have known that the second defendant would tend to acquire GWP shares. This is a requirement that must be met to prove a contravention of s. 188(3) of the CMSA.

[76] I answered this question in the affirmative, as there is evidence pointing to the fact that the defendants had discussed trading in GWP shares, and that the first defendant was aware of the second defendant's interest in trading in GWP shares. This has been elaborated in paras. [41] and [42] above.

[77] Thus, I found that the first defendant had communicated the inside information to the second defendant knowing that she would or would tend to trade in GWP shares.

[78] Next, the second defendant's possession of the inside information can also be inferred from the circumstances surrounding the purchases made during the September 2012 transactions. Specifically, my assessment of the number of GWP shares she purchased, the timing of the purchases and the value of the purchases had led me to the conclusion that the September 2012 transactions were carried out while the second defendant was in possession of the inside information.

[79] The second defendant had been purchasing GWP shares since October 2010. The following table was provided by the plaintiff to show the trend of her purchases:

No.	Transaction Date	Quantity (Units)	Price per Share (RM)	Value (RM)
October 2010 Transaction				
(1)	18.10.2010	50,000	0.7750	39,033.13
February 2011 Transaction				
(2)	23.2.2011	45,000	0.7700	34,903.30
August 2011 Transaction				
(3)	9.8.2011	10,000	0.6300	6,319.89
April 2012 Transactions				
(4)	2.4.2012	12,800	0.6800	8,767.84
(5)	3.4.2012	57,200	0.6800	39,180.05
(6)	5.4.2012	23,800	0.6784	16,264.65
(7)	6.4.2012	25,000	0.6800	17,124.10
(8)	9.4.2012	13,000	0.6800	8,904.70
(9)	10.4.2012	3,000	0.6800	2,083.62
(10)	12.4.2012	25,200	0.6800	17,261.97
August 2012 Transactions				
(11)	10.8.2012	30,000	0.7650	23,177.59
(12)	14.8.2012	33,000	0.8131	27,028.68
September 2012 Transactions				
(13)	25.9.2012	200,000	0.9635	193,524.90
(14)	27.9.2012	150,000	0.9664	145,578.86

[80] I made a few observations on the second defendant's purchasing trend of GWP shares.

[81] Between October 2010 to August 2012, the second defendant purchased between 3,000 to 57,200 shares during each transaction. However, the September 2012 transactions, which were carried out within two days, saw the second defendant purchasing 350,000 GWP shares, far exceeding her previous purchases.

[82] By comparison, prior to the September 2012 transactions, the highest number of GWP shares were purchased by the second defendant in April 2012, with only 160,000 shares purchased over ten days.

[83] The second defendant provided justifications for her large purchase of GWP shares in September 2012. She claimed that:

(i) the dividend yield of GWP shares during that period was high;

(ii) the market of GWP shares between April to August 2012 was illiquid, *ie*, not many shares were available in August 2012; and

(iii) she was hoping for the price of GWP shares to drop after August 2012.

[84] I considered her justifications and found them to be without basis.

[85] In respect of her claim that she purchased GWP shares in September 2012 due to high dividend yield, I considered two reports issued in August 2012. The first is GWP's audited interim financial report for the second quarter ended 30 June 2012, which was issued on 9 August 2012. In this report, GWP announced that its profit after tax for the second quarter of 2012 was 46.9% higher than that recorded in the second quarter of 2011. The second document is a report dated 10 August 2012 by Inet Research, which forecasted that the dividend yield of GWP for the financial year 2012 would be 8.1% ("analyst report").

[86] Both reports were issued in early August 2012, more than a month before the September 2012 transactions. I accepted the second defendant's claim that she purchased GWP shares on 10 and 14 August 2012 based on the "BUY" recommendation in the analyst report. These purchases clearly coincided with the reports.

[87] However, I found that it was not likely for her to have purchased shares during the September 2012 transactions based on the recommendations in the reports. I accepted the following view of the plaintiff's expert witness, David Meow ("PW8"):

> … In, in the trading environment. *In the trading environment, time is of the essence. The timeliness of information is of the essence. If someone were to claim, if someone were to claim that the decision to buy or sell today is based on an event that happened two months ago, that would be very remote, it's very remote.* Very remote to claim that your decision today is influenced by an event that happens two months ago, because, because the, once again. The distance. *The distance between the information and the decision to be made, because the trading environment, we are price sensitive, we are time sensitive.* So in this time sensitive and price sensitive environment, arrival of information is very crucial. Generally it was an opinion which can vary …
>
> (emphasis added)

[88] I am persuaded by PW8's view that time is of the essence in the trading environment, and as such, it is remote to claim that a person's purchase was influenced by events that happened at a time in the past. I can accept the second defendant may have been influenced by the reports issued in August 2012 to purchase GWP shares for high dividend yield. She had reacted by purchasing shares in August 2012. It is too far-fetched for her to claim that the September 2012 transactions – carried out almost two months later – were also carried out based on the same considerations as the August 2012 purchases.

[89] I also found the second defendant's claim that the market was illiquid, and as such, she was unable to purchase GWP shares, was without basis. The list of GWP share prices and trading volumes from 1 January 2012 to 31 December 2012 produced by Bursa Malaysia shows that on 10 August 2012, the total number of GWP shares traded in the market was 231,200. The second defendant only purchased 30,000 shares. On 14 August 2012, when the second defendant purchased 33,000 shares, the total number of GWP shares traded in the market was 1,245,000. Further, from 17 to 27 August 2012, the total number of GWP shares traded in the market was 948,500.

[90] These figures indicate that there were sufficient GWP shares in the market in August 2012, and as such, the second defendant's claim that she did not purchase shares due to the illiquid market was without basis.

[91] It should also be highlighted that from the list of GWP share prices and trading volumes produced by Bursa Malaysia, the price of GWP shares was on an upward trend, and as such, it was neither financially nor commercially sensible for the second defendant to have made the large purchases in the September 2012 transactions, instead of August 2012. The only possible reason why she did so was because she was in possession of the inside information.

[92] The second defendant claimed that she purchased GWP shares for high dividend yield, and that she had relied on the analyst report in making her purchases in August 2012. Yet, she waited more than a month later, on 25 September 2012, when the price of GWP shares was higher, at RM0.9635 per share, to make her purchases. By comparison, the price paid by the second defendant on 14 August 2012 was RM0.8131 per share. The unit share price paid by the second defendant on 25 September 2012 was 18.5% higher than what she paid on 14 August 2012.

[93] Thus, I concluded that the second defendant's justifications for her purchases in September 2012 are without basis, and that it was more probable that she had undertaken the September 2012 transactions because she was in possession of the inside information.

[94] I then considered the amounts the second defendant had spent on the purchase of GWP shares over the years. Prior to the September 2012 transactions, the biggest purchase of GWP shares made by the second defendant was in April 2012, when she purchased shares in the value of RM109,586.93. By comparison, in September 2012, she spent RM339,103.76, which is more than triple what she spent in April 2012.

[95] What is also telling is that, the value of shares purchased during the September 2012 transactions (over a two-day period) is higher than the combined purchases of GWP shares by the second defendant over a two-year period, which is RM240,049.52.

[96] Further, the amount the second defendant spent for the September 2012 transactions was high, in comparison with her savings and income at the material time.

[97] The second defendant's annual income has not been conclusively determined. The plaintiff claimed it was RM143,000, based on her s. 134 statement. However, the second defendant testified during re-examination that it was RM450,000. Even with this higher sum of RM450,000, the amount the second defendant spent in the September 2012 transactions, which was RM339,103.76, is significant in comparison to her annual income.

[98] I also considered that the cheques issued to purchase GWP shares for the September 2012 transactions were issued from the second defendant's account and her husband's account. The amounts in these cheques are significant, in comparison to the amounts in the accounts where the cheques were issued. The cheque for RM145,143.60 issued by the second defendant constituted 55.31% of the monies in her account while the cheque for RM48,381.30 issued from her ex-husband's account constituted 71.69% of monies in his account.

[99] The second defendant provided an explanation for the high amount of monies used for her purchases in September 2012. During re-examination, when asked to clarify why her purchases in the September 2012 transactions were higher than all her previous purchases of GWP shares combined, she explained that 200,000 out of the 350,000 shares purchased were for her father-in-law:

> *This 200,000 shares was actually the father of my ex-husband, which is the then father-in-law.* Then he sold his business which the business was actually registered under the name of my ex-husband. *So, after he sold the business, so the money, the proceeds money, he gave us, gave to help him to invest, to manage that money for him.* So then from my purchase experience, like I mentioned before, on August, on 9th of August, there was an announcement of high profit by the Great Wall Plastic. *So, the analyst report came out on 10th of August, the dividend yield was at 8.01%. So at that point of time, I talked to my ex-husband, which was then husband that say, hey, why not we use this money to invest, to invest for the for the father because this is a safe account and high yield, dividend yield. After he, after he listened to this, he was impressed with this such high dividend yield then only he had the understanding then we invest this for his father.* (emphasis added)

[100] Based on the second defendant's testimony, she purchased 200,000 GWP shares from monies provided by her then father-in-law. The second defendant had spoken to her husband after she was aware of the high dividend yield of GWP shares from the analyst report, and recommended that the money given by the father-in-law be used to purchase GWP shares.

[101] I must highlight that the second defendant's testimony is inconsistent with her statement in her second s. 134 statement, where she informed the plaintiff that her ex-husband only found out about the September 2012 transactions after the transactions had been completed:

> Q: Why did your husband, Lai Joon Hoe not trade in GW Plastics shares on 25 & 27 September 2012?
>
> A: I think because I am in charge of the funds, so since I am already trading in GW Plastics shares, so he does not need to. **But he only found out about my trades after it was completed.** But for my husband's personal trades, I wouldn't know why he did not trade on those dates. But after I informed him of my trades in GW Plastics, he did not trade because I have ready traded.
>
> (emphasis added)

[102] Her inconsistent positions raise serious doubts as to the truth of her statement that she had consulted her husband prior to the September 2012 transactions, and that she purchased 200,000 GWP shares from monies provided by her father-in-law. These explanations were only raised during re-examination, and were never raised by the second defendant in her s. 134 statements.

[103] Further, I have also noted that the second defendant informed the plaintiff in her second s. 134 statement that her father-in-law had sold his business in 2010 and gave RM200,000 for her husband to manage. This would mean that her husband had access to the RM200,000 since 2010. If the second defendant's intention was to utilise the money to trade in GWP shares, then the likely possibility is that she would have purchased shares in August 2012 using monies provided by her father-in-law, immediately after she considered the analyst report. The fact that she only purchased the shares in September 2012, and only after the price of the shares had increased, had led me to conclude that the September 2012 transactions were carried out because she was in possession of the inside information.

The Second Defendant's Dealings In Shares In Other Counters

[104] Finally, I considered the third circumstantial evidence on the second defendant's possession of the inside information. This is derived from a comparison between the September 2012 transactions and the second defendant's trading patterns in other counters, including Genting Berhad, Supermax Berhad, Sumatec Resources Berhad and Talam Transform Berhad over four years between 2010 and 2014.

[105] The comparison produced glaring results. From the second defendant's trades in other counters, it is clear that the second defendant's usual range of investment is between RM8,386.54 to RM35,836.39. This range is similar to her range of investment in GWP shares prior to September 2012, which is between RM2,083.62 to RM39,180.05.

[106] However, the second defendant's purchases of GWP's shares during the September 2012 transactions far exceeded this comfortable range. This suggests high confidence in the purchases, which further suggests that on the balance of probabilities, the second defendant was in possession of the inside information when the September 2012 transactions were carried out.

Findings

[107] In examining the circumstantial evidence before this court, I considered the case of *Chan Soon Huat* (*supra*), where Abu Bakar Jais J (as His Lordship then was) held that:

> [38] As the proof required is on the balance of probabilities, there should be no issue that the circumstantial evidence must point irresistibly to the liability of the defendant. The present case as pointed out did not proceed as a criminal prosecution. And since this is civil action, the burden of proof is lessened. **As long as there are facts pointing to circumstantial evidence, the insider could be found liable.** Of course, if the circumstantial evidence is found wanting, the alleged offender should be protected from being made answerable. **In the end, the court has that duty to assess and evaluate whether that circumstantial adduced is sufficient.** It should not be too difficult to appreciate that direct evidence is not easily available when confidential information is shared by a few individuals with the aim for profit or avoiding losses. And our statutory provision allows for civil action and the cases highlighted without doubt do not prohibit circumstantial evidence. More than that, as shown, the cases and intention of the legislature has always been for insider trading to be proven on the balance of probabilities instead of beyond reasonable doubt when civil action is initiated. Therefore, this court accepts that circumstantial evidence should not without cogent reasons be rejected especially when the burden is on the balance of probabilities.
>
> (emphasis added)

[108] It is the duty of the court to conduct an assessment and evaluation of the circumstantial evidence before it. The result of the assessment and evaluation must be that the circumstantial evidence is able to form an unbroken chain of evidence leading only to one inference (see *Majlis Peguam v. Cecil Wilbert Mohanaraj Abraham* [2019] 5 CLJ 139).

[109] I have assessed and evaluated the evidence before this court, and reached the following factual conclusions:

(i) that the relationship between the defendants was one of a close friendship;

(ii) that the communications between defendants at the time of the September 2012 transactions were not for the purpose of a medical insurance proposal;

(iii) that the proximity of the communications between the defendants and the September 2012 transactions is not a mere coincidence;

(iv) that the second defendant's justifications for purchasing GWP shares in September 2012 (namely high dividend yield, illiquid GWP shares in August 2012 and the wait for share prices to drop) were without basis; and

(v) that the number and value of shares purchased in the September 2012 transactions were significantly higher than the second defendant's comfortable range, as compared to her usual purchases of GWP shares and shares in other counters.

[110] These conclusions, considered as a whole, have led me to draw the irresistible inference that on the balance of probabilities, the second defendant was in possession of the inside information at the time she carried out the September 2012 transactions.

[111] The same approach in assessing circumstantial evidence was taken in *Chan Soon Huat* (*supra*), *Yap Wee Hin* (*supra*) and *Toh Kai Fatt* (*supra*). In *Chan Soon Huat* (*supra*), the court took into account the close relationship between the defendant and the directors of WCT Berhad, the defendant's reluctance to admit to this close relationship and the timing of the disposal of securities in WCT Berhad. In *Yap Wee Hin* (*supra*), I considered circumstantial evidence in the form of the defendant's role in Patimas Computers Berhad ("PCB") which pointed to the likelihood of his possession of inside information, together with his close relationship with the managing director of PCB. In *Toh Kai Fatt* (*supra*), the defendant's possession of inside information was inferred from the relationship between the defendant and the informant, the timing of contacts between them and the timing of the trades carried out by the defendant.

[112] I must stress that it is not just one or two findings of fact that led me to the inference that the second defendant was in possession of the inside information. The friendship between the defendants and their communications at the time of the September 2012 transactions in themselves may not be a sufficient indicator of the second defendant's possession of the inside information. But when these findings are coupled with the conduct of the defendants, including their reluctance to admit their close friendship, the second defendant's peculiar purchasing trends and her inconsistent explanations on the purchases, a more complete picture is painted. I considered all pieces of the mosaic of information that formed the circumstantial evidence, and concluded that as a whole, they could only lead to one conclusion, that the second defendant was in possession of the inside information at the time she carried out the September 2012 transactions.

[113] With the finding that the defendants were in possession of the inside information and specifically, that the second defendant was in possession of the inside information at the time she carried out the September 2012 transactions, the first element to prove insider trading has been met.

[114] As a final point, I will address the first defendant's argument that the plaintiff must prove that the second defendant acquired GWP shares because the first defendant communicated the inside information to her on 25 September 2012.

[115] In my view, this argument is erroneous. The prohibitions imposed in s. 188(2)(a) of the CMSA are against an insider acquiring or disposing of securities related to the inside information in his possession. Section 188(1) defines an insider as a person in possession of material inside information and who knows or ought reasonably to know that the information is not generally available. From a reading of s. 188(2)(a) with s. 188(1), the moment a person is in possession of inside information, the prohibitions against acquiring or disposing of the securities in issue would be triggered. The provisions do not require any proof that the prohibited conducts were carried out because the insider was in possession of inside information.

[116] My view is consistent with the findings of Azizul Azmi Adnan J (as His Lordship then was) in his judgment on the striking out applications for this action (see *Suruhanjaya Sekuriti Malaysia v. Lim Kok Boon & Anor* [2019] CLJU 1269; [2019] 1 LNS 1269; [2019] MLJU 937). His Lordship held as follows:

> [17] The second significant change was that the causal nexus between the inside information and the prohibited conduct was severed: it no longer became necessary for the prosecution to establish that the accused person had used the inside information for the purposes of trading. There was now a blanket trading prohibition: *once a person is in possession of material nonpublic information and he knows this to be the case, he simply cannot trade on the securities to which the information relates. It does not matter that he had not used the information for the purposes of his trading.* As will be seen later, this is a point that is pertinent in the context of the present applications.
>
> (emphasis added)

[117] Thus, the plaintiff is not required to show that the second defendant acquired GWP shares because of the communication of the inside information by the first defendant. Instead, what is required to be shown is only that the second defendant acquired GWP shares whilst in possession of the inside information. In my view, this has been sufficiently established.

Element 2: The Inside Information Must Not Have Been Generally Available

[118] Section 184 of the CMSA provides guidance on what is meant by information being generally available. The section states:

> (1) For the purposes of this Subdivision, information is generally available if the information has been made known in a manner that would, or would tend to, bring it to the attention of reasonable persons who invest in securities of a kind whose price or value might be affected by the information, and since it was so made known, a reasonable period for it to be disseminated among, and assimilated by, such persons has elapsed.

[119] I find it to be quite clear from the evidence before this court that the inside information was made generally available on 3 October 2012, by way of the announcement. There is no evidence to show that the inside information was made generally available prior to the announcement, and prior to the September 2012 transactions.

[120] The first defendant claimed he received comments and questions on the goings-on in GWP, during the annual dinner of the Perak branch of the Malaysian Plastics Manufacturing Association on 21 September 2012 and during a telephone call he received on the same day from Ng Siek Chuan, the former Chief Executive Officer of Alliance Bank Malaysia.

[121] I observed a peculiarity in the conduct of the first defendant in making this claim. The first time he raised this claim was in this first s. 134 statement dated 14 October 2014. He made this claim a few times in the course of the statement. He made the same claim in letters of representations dated 3 August 2016 and 10 May 2019 sent to the plaintiff. In these statements and letters, not once did he mention the telephone call he received from Ng Siek Chuan. The reference to the telephone call was only made years later, by way of his witness statement filed on 3 February 2020 (which was eventually amended, re-filed on 13 June 2022, and marked as WS-DW3(A)).

[122] A fact as important as the telephone call, in my view, should have been raised by the first defendant the first time he made the claim the inside information was leaked, which was on 14 October 2014. The fact that it was referred to several years later has led me to conclude that this was an afterthought, and raised doubts in my mind on the veracity of the first defendant's claim of the leak of the inside information.

[123] It is also the first defendant's contention that the inside information was known to at least 13 individuals including Ng Seik Chuan, and that anyone of them could have caused the inside information to have become generally available. The first defendant proffered no evidence to support such a contention. I considered the findings of the court in *Sreesanthan Eliathamby* (*supra*), where it was held that if a research report contained material non-public information (as distinct from an analysis of information from publicly available sources), the publication of that report to a select group of clients would not cause the information in question to become generally available. Thus, in the present case, even if the inside information was disclosed to a select group of individuals involved in the corporate exercise, this would not mean that the inside information had become publicly available.

[124] Ultimately, the burden is on the first defendant who claimed that the inside information was leaked and was generally available, to prove this leak. Section 103 of the Evidence Act 1950 provides that:

> The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

[125] The first defendant did not provide any evidence to support his claim, and as such, he failed to discharge this burden. It is not open to him to shift the burden to the plaintiff to prove a factual allegation that he made. This approach is inconsistent with s. 103 of the Evidence Act 1950.

[126] Thus, I find that the second element under s. 188 of the CMSA, that the inside information was not generally available until 3 October 2012, has been met.

Element 3: The Defendants Should Have Known Or Ought Reasonably To Have Known That The Inside Information Was Not Generally Available

[127] This element is contained in the second limb of s. 188(1) of the CMSA. Section 188(1) provides that a person qualifies as an insider if that person:

> (a) possesses information that is not generally available which on becoming generally available a reasonable person would expect it to have a material effect on the price or the value of securities; and
>
> (b) **knows or ought reasonably to know that the information is not generally available.**
>
> (emphasis added)

[128] This second limb looks into the state of mind of the insider in relation to the status of the inside information.

[129] In examining whether this element had been met, I considered the case of *Lew Chee Fai Kevin v. Monetary Authority of Singapore* [2012] 2 SLR 913, where the Singapore Court of Appeal adopted a two-step approach in determining whether the insider knew or ought reasonably to have known that the inside information was not generally available:

> [139] The Judge did not elaborate on how the objective mens rea limb of s. 218(1)(b) (*ie*, the "ought reasonably to know" limb) should be interpreted. In this regard, we are of the view that the interpretation proffered in *R v. Rivkin* ([30] *supra*) with regard to the equivalent Australian legislation ought to be adopted. In *R v. Rivkin*, the court held (at [94]) that the "ought reasonably to know" limb "remain[ed] one that [was] subjective to the [person], having regard to all of the relevant circumstances, including the [person's] mental state at the time" [emphasis added] ("the *Rivkin* test"). *Hence, in examining the issue of whether the alleged insider trader knew or ought reasonably to have known that the information in question was not generally available, the court concerned should first consider if a reasonable person would consider the information not to be generally available. If so, consideration would then be given to the alleged insider trader's circumstances (including his or her mental state, experience and level of commercial expertise) in order to determine if there are subjective factors which would prevent him from arriving at the same conclusion.* This analysis applies to both s. 218(1)(b)(i) (*ie*, *mens rea* with regard to general availability of the information) and s 218(1)(b)(ii) (*ie*, *mens rea* that the information might have a material effect) (reproduced above at [138]). (emphasis added)

[130] The first step in the two-step approach adopted in *Lew Chee Fai Kevin* (*supra*) requires considering whether a reasonable person would conclude that the information is not generally available. The assessment of the general availability of the inside information is not a technical assessment. It merely involves reviewing news articles, press releases, reports and other materials including information on the internet, to assess whether the information has been disseminated to the public. As such, my view is that the reasonable person in question does not need to be an investor, or one who has technical knowledge in share trading or investments. It is sufficient for the person to have some degree of knowledge in investments, only to enable him to assess whether information has been made generally available to the public.

[131] In this case, there is no evidence of any news articles, press releases, reports or materials including those on the internet, on the inside information, until the announcement. As such, a reasonable person would be likely to conclude that the inside information was not generally available until the announcement.

[132] Moving on, I considered the second step of the test in *Lew Chee Fai Kevin* (*supra*). This involves assessing the insider's circumstances, including his mental state, experience and level of commercial expertise, to determine if there are subjective factors that would prevent him from arriving at the same conclusion.

[133] I took into account the fact that the first defendant was the Chief Executive Officer of GWP, and was actively involved in negotiations on the disposal. Further, given the first defendant's experience and background in the corporate sector, he would have known that the inside information is market-sensitive and price-sensitive information, and would not have been generally made available. He also confirmed in his second s. 134 statement dated 24 October 2014 that he had adopted a strictly "need-to-know" approach in relation to information on the disposal.

[134] The second defendant is also experienced in share trading, having opened a trading account in 2005. As such, she would also have known or ought reasonably to have known that the inside information was not generally available. Further, she confirmed that she did not come across any articles or reports on the disposal.

[135] Taking into account the defendants' collective experience in the corporate sector and share trading, I found that the defendants should have known or ought reasonably to have known that the inside information was not generally available until the announcement.

[136] With this, the third element to prove insider trading has been met.

A **Element 4: The Inside Information Must Have Been Material**

[137] Section 185 of the CMSA states that:

> For the purposes of this Subdivision, an information that on becoming generally available would or would tend to have a material effect on the price or value of securities, refers to *such information which would or would tend to, on becoming generally available, influence reasonable persons who invest in securities in deciding whether or not to acquire or dispose of such securities, or enter into an agreement with a view to acquire or dispose of such securities.*
>
> (emphasis added)

[138] I accepted the expert evidence of PW8 on the question of the materiality of the inside information. In the expert report dated 21 November 2018 prepared by PW8, the following factors were listed as factors that determined whether a particular information is material:

(i) the substance of the information;

(ii) the specificity of the information;

(iii) the reliability of the source of the information;

(iv) whether there was any ambiguity in the information; and

(v) whether the information was within the expectation of a reasonable investor.

[139] The expert report explained what the first factor, the substance of the information, entails the following:

> **6.4.1 Substance (Material effect on price or value of securities)**
>
> Substance refers to the component within sec. 185 which requires the information to have or to tend to have 'a material effect on price or value of securities'. It pertains to the level of Information quality that has probable impact to the price of a security and/or a change in investment decision of a reasonable investor.
>
> *The price of securities is a function of market forces of demand and supply. If the information could be expected to alter this function of demand and supply in a substantial manner, the reasonable investor would or would tend to be influenced in his decision to trade.* (emphasis added)

[140] In this case, the inside information is information related to the disposal and the distribution. The report analysed the financial impact of the disposal and concluded that the net assets or the shareholders' equity value of GWP would be expected to increase by 89%, with the book value per share increasing from RM0.652 to RM1.232. From this, my view is that the inside information is of substance.

[141] The report then assessed the next factor, specificity, and explained that for information to have a material effect on the value of securities, such information requires an amount of specificity that would influence the reasonable investor. I am of the view that the information related to the disposal is sufficiently specific, and would be able to have such an effect.

[142] The third factor; reliability, is dependent on the source of the information. The report stated that reliability would be strong if a person possessed the information from a corporate insider. In this case, the first defendant was directly involved in the disposal, and the inside information was obtained by the second defendant from him. Thus, the inside information is reliable.

[143] With respect to the fourth factor; ambiguity, it is stated in the report that the more ambiguous the effect of the information is on price, the less material that information is considered to be. In my view, the disposal would not have an ambiguous effect on the price of GWP shares.

[144] The final factor is whether the information was within the expectation of a reasonable investor. In this regard, the report stated that the question to ask is – would the reasonable investor consider it important to want to know the information content of the announcement. I answered this question in the affirmative, as I am of the view that the reasonable investor would attach importance to the inside information in deciding on whether or not to acquire or dispose of GWP shares.

[145] Taking all factors laid out in the report into account, I found the inside information to be material. Considering the impact of the disposal and the distribution on GWP and the shares of GWP, I am of the view that the inside information, on becoming generally available, would influence reasonable investors in deciding whether or not to acquire or dispose of GWP shares.

[146] Further, it is in evidence that after the announcement, there was an increase in the closing price and total value of GWP shares traded. This lends credence to the argument that the inside information was material, as upon becoming generally available, the inside information had influenced reasonable persons who invest in shares to acquire GWP shares.

[147] As such, the fourth element to prove insider trading – that the inside information was material – has been met.

Element 5: The September 2012 Transactions Must Involve Shares That Relate To The Inside Information

[148] This element is not disputed. The September 2012 transactions involve the purchase of GWP shares. It is agreed that these shares are the subject of the inside information.

A **Element 6: The Shares Purchased During The September 2012 Transactions Must Fall Within The Definition Of "Securities"**

[149] It is also beyond dispute that the GWP shares that are the subject matter of the September 2012 transactions fall within the definition of "securities" under s. 2 of the CMSA.

B **[150]** Section 2 provides that:

> "securities" means –
>
> (a) debentures, stocks or bonds issued or proposed to be issued by any government;
>
> C (b) **shares in or debentures of, a body corporate or an unincorporated body;** or
>
> (c) units in a unit trust scheme or prescribed investments,
>
> and includes any right, option or interest in respect thereof …
>
> D (emphasis added)

[151] GWP is a body corporate and as such, its shares fall within the definition of "securities" in s. 2 of the CMSA.

[152] Thus, the sixth and final element to prove insider trading has been met.

E **Other Issues**

[153] For completeness, I will address a few issues raised by the defendants.

Mens Rea For Insider Trading

F **[154]** The first defendant argued that intention or *mens rea* on the part of the tipper is integral to proving liability under s. 188(3) of the CMSA. The first defendant's case is that to establish the *mens rea* element under s. 188(3), the plaintiff is required to prove the intention of the first defendant to use the inside information in a manner that would benefit the second defendant. It G was argued that in this case, the plaintiff failed to prove such intention.

[155] A reading of s. 188 does not support the first defendant's argument. The section does not provide the intention to benefit as an element to prove insider trading. Instead, the intention or *mens rea* element to prove a contravention of s. 188(3)(a) is limited to the tipper knowing or ought H reasonably to have known that the information is not generally available (s. 188(1)(b)), and that the tippee would or would tend to acquire, dispose or enter into an agreement to acquire or dispose shares (s. 188(3)(a)).

[156] My views are in line with the findings of Azizul Azmi Adnan J (as His Lordship then was) in his judgment in the applications to strike out this suit I (see *Lim Kok Boon* (*supra*)). The findings of the court are as follows:

[25] Mr Steven Thiru for the first defendant raised a different but related point regarding the sufficiency of pleadings. Mr Thiru argued that insider trading claims are akin to claims in fraud, and accordingly the *mens rea* element of the alleged wrong is fundamental and should have been expressly pleaded. As authority for his proposition, he referred to a number of cases from the United States on insider trading.

[26] This submission, in my respectful view, overlooks the plain words of section 188(3)(a) of the CMSA, and the scheme of Subdivision 2 of Division 1 of Part V of the Act as a whole. As explained at paragraph 16 *ante*, the *raison d'etre* for the 1998 amendments to the insider trading provisions in the Securities Industry Act 1983 was to move to the market integrity principle, under which *it was no longer necessary for the prosecution (or, in a civil action such as the present, the Commission) to prove the mens rea relating the purpose for the material non-public was used or communicated. All that is necessary in order to establish mens rea for the purposes of the tipping prohibition is to prove:*

(a) that the first defendant knew or ought reasonably to know that the information in question was not generally available (section 188(1)(b)); and

(b) that he knew or ought reasonably to know that the second defendant would or would tend to trade in the shares of GW Plastics (section 188(3)).

(emphasis added)

[157] It must also be highlighted that the decision of the High Court was unanimously upheld by the Court of Appeal.

[158] The first defendant's argument that intention is an essential element to prove a contravention of s. 188(3)(a) is also inconsistent with the legal position that motive is not a necessary element of a crime in all cases. I am in this regard guided by *Pathmanabhan Nalliannen v. PP & Other Appeals* [2017] 4 CLJ 137, where the Federal Court held that:

[163] The Court of Appeal in *Abdul Samid Edward v. PP* [2015] 4 CLJ 149 made similar remarks which read:

> Although motive was an important element to look out for when relying on circumstantial evidence to convict an accused, it was not in our view, an absolute must, in the sense that, an absence of an established 'motive' would exculpate the accused from the charge proffered against him, notwithstanding all other evidence which points to the accused being guilty of the crime charged.

…

[165] We wholly endorse the observations made above in that *motive is an important factor but not an ingredient of an offence to be proved in cases which turn on circumstantial evidence as in the present case. That said, it does not mean that where evidence of motive is vague, non-existent or not clear, an accused is exculpated provided there is sufficient evidence pointing to his guilt.*

(emphasis added)

[159] Thus, the absence of the motive of the tipper to benefit the tippee as an element in proving insider trading under s. 188(3)(a) is not inconsistent with the legal position that motive is not an essential ingredient of an offence in all cases which turn on circumstantial evidence.

[160] Further, the *mens rea* elements in s. 188(3)(a) are clear, and do not contain the element of intent to benefit. In a case where the provisions of a statute are clear, the court must give effect to the express provisions, and not import any meaning beyond what has been expressly provided for.

[161] As such, I hold that it is not necessary for the plaintiff to prove the intention of the first defendant to use the inside information in a manner that would benefit the second defendant.

Abuse Of Process

[162] The first defendant pleaded that this claim is an abuse of the process of the court. In para. 1 of the first defendant's amended defence, it is stated:

> At the very outset, the First Defendant contends and will contend that the Amended Writ of Summons dated 13.10.2017 and the Amended Statement of Claim dated 12.10.2017 ("the Amended Statement of Claim") fails to disclose any or any reasonable cause of action and/or is scandalous, frivolous or vexatious and/or is otherwise an abuse of process of the Court and should be struck off *in limine*.

[163] The allegation of the abuse of the process of the court was not pursued further during trial. Instead, the first defendant contended that the abuse he alleged is the abuse of the process of investigation by the plaintiff. He argued that the concept of the abuse of the process of the court is wide and should capture a myriad of circumstances.

[164] I do not disagree. The process of investigation or the background behind the initiation of proceedings which leads to an action being filed, could give rise to the tort of abuse of process of the court.

[165] However, the key consideration in determining whether an action filed in court is an abuse of the process of the court is whether the court action (not the investigation process or other processes that led to the court action being filed) is an abuse of process. This is clear in *Malaysia Building Society Bhd v. Tan Sri General Ungku Nazaruddin Ungku Mohamed* [1998] 2 CLJ 340; [1998] 2 MLJ 425, where the Court of Appeal laid out the essential elements of the tort of abuse of process. They are as follows:

> (1) The process complained of must have been initiated;
>
> (2) *The purpose for initiating that process must be some purpose other than to obtain genuine redress which the process offers. In other words, the dominant purpose for which the process was invoked must be collateral,* that is to say, aimed at producing a result not intended by the invocation of the process; and
>
> (3) The plaintiff must have suffered some damage or injury in consequence. (emphasis added)

[166] From the elements laid out, the key question to be asked relates to the court process, and whether the process is for a purpose other than to obtain a genuine redress *ie*, a collateral purpose. In answering this question, various circumstances can be taken into account, such as the investigation process. It is on this basis that the cases relied on by the first defendant, namely *Re Vernazza* [1960] 1 All ER 183, *Indah Desa Saujana Corporation Sdn Bhd & Ors v. James Foong Cheng Yuen & Anor* [2008] 1 CLJ 651; [2008] 2 MLJ 11 and *See Thong v. Saw Beng Chong* [2012] CLJU 817; [2012] 1 LNS 817; [2013] 3 MLJ 235 held that the history of the proceedings, the documents initiating the proceedings, and other circumstances are important indicators of whether the process of the court has been abused.

[167] However, I disagree with the first defendant that these cases support his argument that the tort of abuse of process can be extended to include the abuse of the process of investigations. The processes leading to the filing of an action is only one of the factors that indicate whether or not the process of the court has been abused.

[168] Applying the elements of the tort of abuse of process of the court in *Malaysia Building Society Bhd* (*supra*), I find the key element, namely whether the purpose of initiating this action is for some other purpose than to obtain genuine redress, has not been met. There is no evidence to suggest that this action is anything more than the plaintiff seeking genuine redress for contraventions of s. 188 of the CMSA.

[169] Thus, the court finds that there is no basis for the allegation that this action is an abuse of process.

The Character Of The First Defendant

[170] The first defendant attempted to establish that his conduct and character are uncharacteristic of a person who indulged in or intended to indulge in insider trading. He gave evidence that he had intended to seek an immediate suspension of trading in GWP shares on the suspicion that there had been a leak of the inside information, that he wanted the SSA to be finalised expeditiously, that he constantly followed up with the company secretary of GWP, Lee Ying Fong, on the suspension of the trading counter of GWP, and that he contacted officers of Bursa Malaysia on the unusual trading activity on the GWP trading counter.

[171] The first defendant also maintained that in his long career in the corporate sector, he had always practised a strict policy of corporate governance in maintaining the confidentiality of price-sensitive information. He also claimed to have always highly upheld the principles of trust and integrity.

[172] In evaluating this argument, I looked to s. 52 of the Evidence Act 1950, which provides that:

> In civil cases the fact that the character of any person concerned is such as to render probable or improbable any conduct imputed to him is irrelevant, except so far as his character appears from facts otherwise relevant.

[173] Based on this provision, in civil cases, the evidence of the character of a person whether good or bad, is irrelevant to determine the probability of the conduct imputed to that person. The reasoning behind character being an irrelevant fact in civil cases is that the probability of committing a civil wrong such as breaching a contract is unlikely to be connected to the character of a person – a person of good character could be in breach of a contract, and a person of bad character may be adversely affected by a breach of contract.

[174] Further, in cases of white-collar crimes such as insider trading, it is a person's good character that would have put him in a position of responsibility and trust, which would in turn have allowed him to commit the wrong. In *R v. McQuoid* [2009] 4 All ER 388, the English Court of Appeal held:

> [8] Insider dealing has been an offence in England and Wales since 1980. The current offence is created in Pt V of the Criminal Justice Act 1993, which replaced the Company Securities (Insider Dealing) Act 1985, which in turn replaced similar provisions contained in ss. 68 to 73 of the Companies Act 1980. Those who involve themselves in insider dealing are criminals: no more and no less. The principles of confidentiality and trust, which are essential to the operations of the commercial world, are betrayed by insider dealing and public confidence in the integrity of the system which is essential to its proper function is undermined by market abuse. Take-over arrangements are normally kept secret. Very few people are permitted to have advance knowledge of them. *Those who are entrusted with advance knowledge are entrusted with that knowledge precisely because it is believed that they can be trusted. When they seek to make a profit out of the knowledge and trust reposed in them, or indeed when they do so recklessly, their criminality is not reduced or diminished merely because they are individuals of good character.* (emphasis added)

[175] Thus, in this case, the argument of the first defendant must fail, as person's character cannot be an indicator of whether he committed insider trading.

Allegations Against Siti Naquiah

[176] In WS-DW3(B), the first defendant alleged that Siti Naquiah Ahmad Sabri ("Siti Naquiah"), the plaintiff's initial investigating officer, had difficulties understanding the mechanics of the disposal, did not have qualifications and experience in law, in corporate transactions and in handling investigations into corporate transactions, and was hostile or indifferent towards him.

[177] I considered these allegations and made three findings.

[178] First, if the first defendant had serious concerns on the abilities and conduct of Siti Naquiah, these concerns would have and should have been raised at the first available opportunity. I note that the first defendant had issued letters of representations to the plaintiff on 3 August 2016 and 10 May 2019. The allegations were not raised then. Neither were they raised in the original defence of the first defendant, filed on 30 October 2017, or affidavits filed in the course of interlocutory applications in these proceedings. The allegations were only made in WS-DW3(B), filed on 11 May 2022. Thus, I find these allegations to be mere afterthoughts created by the first defendant.

[179] Next, the burden is on the first defendant, who raised these allegations, to prove them. This is clear in s. 103 of the Evidence Act 1950, which provides that the burden of proof of a particular fact lies on the person who wishes the court to believe in its existence. As the first defendant wished the court to believe that Siti Naquiah did not understand the mechanics of the disposal, did not have the necessary qualifications and experience, and was hostile towards him, he must prove this fact by calling Siti Naquiah as a witness.

[180] In *Juahir Sadikon v. Perbadanan Kemajuan Negeri Johor* [1996] 4 CLJ 1; [1996] 3 MLJ 627, the appellant alleged that one Tan Sri Dato' Hj Basir bin Ismail ("Tan Sri Basir") had made a representation on the purchase price of the premises in issue. This fact was denied by the respondent. However, the appellant failed to produce Tan Sri Basir as a witness. The Court of Appeal found this failure to be fatal to the appellant's case, and held as follows at p. 9 (CLJ); p. 635 (MLJ) of the judgment:

> *He who alleges must prove such allegation and the onus is on the appellant to do so. See s. 103 of the Act. Thus, it is incumbent upon the appellant to produce Tan Sri Basir as his witness to prove the allegation.* The fact that the appellant was unable to secure the attendance of Tan Sri Basir as a witness does not shift the burden to the respondent to produce the witness and testify as to what he had uttered, as firstly, the respondent never raised such an allegation and, secondly, has denied even making one. For this very reason, the adverse inference under s. 114(g) of the Act relied upon by the appellant cannot be accepted as establishing that if the witness had been produced, his evidence would work against the respondent. *There is no obligation in law for the respondent to produce the witness as that obligation rests with the appellant, the party who alleges, and the fact that the appellant was unable to do so is fatal to his case.* For this very reason too, the adverse inference under s. 114(g) is invoked against the appellant.
>
> (emphasis added)

[181] In this case, the first defendant failed to produce Siti Naquiah as a witness, to prove his allegations against her. Following *Juahir bin Sadikon* (*supra*), I find the failure to be fatal to the first defendant's case. However, this fatality does not shift the burden of proving the allegation to the plaintiff.

[182] Finally, there is simply no evidence that Siti Naquiah was hostile towards the first defendant. It is not in dispute that after each s. 134 statement recorded by Siti Naquiah, the first defendant was given the opportunity to read and review his statements, to make corrections or add to the statements, and to confirm that he did not have any further corrections or additions to make. The email communications between Siti Naquiah and the first defendant did not indicate any hostility between them.

[183] From the totality of the evidence before the court, the first defendant has not proven his allegations against Siti Naquiah.

Decision

[184] I find that the plaintiff has sufficiently established the elements that prove contraventions of s. 188(3)(a) of the CMSA by the first defendant and s. 188(2)(a) by the second defendant. On this basis, the plaintiff's claim is allowed.

[185] The reliefs sought by the plaintiff in para. 34 of the amended statement of claim are allowed, save for para. 34(ii)(c), which is the civil penalty against the second defendant. The civil penalty imposed against the second defendant is RM500,000.

[186] I have imposed the maximum civil penalty of RM1,000,000 on the first defendant, after taking into account his position in GWP and the direct role he had in the disposal.

[187] The opportunity to carry out insider trading is available to a person who is in a position of trust. Ironically, the person is given that position of trust precisely because he would have built a reputation as someone capable of being trusted. Thus, the commission of insider trading by one seen to be a vanguard of trust and integrity is in my view an ultimate betrayal. The implications of his actions are far-reaching, affecting the company involved, its advisors, shareholders and investors. Insider trading is a serious offence, and if left unchecked would lead to the loss of public confidence in the securities market. It is for this reason that I imposed a maximum civil penalty of RM1,000,000 on the first defendant.

[188] The second defendant was a person who took advantage of the betrayal of that trust, for her own benefit. She knew or ought reasonably to have known that the acts committed by her and the first defendant are illegal. Yet, driven by her desire to make more money and her trust in the first defendant, she proceeded with the September 2012 transactions. The confidence of other market participants should not be undermined by the actions of persons who disregarded laws and thought they could escape punishment. I considered the second defendant's contravention to be sufficiently serious to justify a civil penalty of RM500,000.

[189] In respect of costs, the plaintiff argued that costs should be awarded on an indemnity basis, as the trial of this case spanned over three years, from February 2020 to May 2023. The plaintiff claimed that the case was unnecessarily prolonged by the filing of amendment applications by the defendants during trial and by the late filing of documents by the defendants.

[190] While I accept that the court has an unfettered discretion to award costs on an indemnity basis (see *Takako Sakao v. Ng Pek Yuen (No 2)* [2010] 1 CLJ 419; [2010] 2 MLJ 181), I find that the circumstances of this case do not justify the award of costs on an indemnity basis. Although the trial was prolonged, and various issues were raised by the defendants in the course of these proceedings, the issues raised were not outside the usual scope of defences that the defendants are entitled to raise. Neither were they inappropriate or raised in bad faith.

[191] As such, after considering the costs due to the defendants from interlocutory applications decided in favour of the defendants, the court ordered costs of RM200,000 to be paid by the first defendant to the plaintiff, and RM30,000 to be paid by the second defendant to the plaintiff.